Underwriters Laboratories, Inc. *and* International Union of Operating Engineers, Stationary Local No. 39, AFL–CIO. Case 32–CA–13189

March 27, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

This case is on remand from the United States Court of Appeals for the Ninth Circuit.[1] The court directed the Board to determine whether statements made by Union Representative Robert Herbruger at the October 27, 1992 employee meeting were threats that interfered with the employees' free choice.

On December 19, 1996, Administrative Law Judge Earldean V.S. Robbins issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Union filed a brief in opposition to the Respondent's exceptions.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Underwriters Laboratories, Santa Clara, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] On September 28, 1993, the National Labor Relations Board issued its Decision and Order in this proceeding in which it found that the Respondent violated Sec. 8(a)(5) and (1) by refusing to bargain with the Union. 312 NLRB 475. Thereafter, Respondent filed a petition with the united states court of appeals for review and the Board filed a cross-petition for enforcement of the Board's Order. In an unpublished opinion dated August 24, 1995, the court remanded the case for further proceedings consistent with the court's opinion. The Board accepted the court's remand and remanded the case to the administrative law judge for a hearing and decision.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In affirming the judge's decision we do not rely on her finding that there was no evidence that any employee felt intimidated or coerced by Herbruger's statement.

A. Donald Rhoads, Esq., for the General Counsel.
Alan J. Gross, of Los Angeles, California, for the Respondent.
Sandra R. Benson, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld), for the Charging Party.

DECISION

STATEMENT OF THE CASE

EARLDEAN V.S. ROBBINS, Administrative Law Judge. Pursuant to an order of the National Labor Relations Board (the Board), this matter was heard before me on June 19, 1996. On May 21, 1993, a complaint issued in Case 32–CA–12189 alleging violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act), by refusing the request to bargain made by International Union of Operating Engineers, Stationary Local No. 39, AFL–CIO (the Union), following the Union's certification in Case 32–RC–3595. On September 28, 1993, the Board issued a decision and order granting the General Counsel's Motion for Summary Judgment, and finding that the Underwriters Laboratories, Inc. (UL or Respondent), had violated Section 8(a)(5) and (1) of the Act as alleged in the complaint.[1] Thereafter, the Respondent filed a petition with the United States Court of Appeals for the Ninth Circuit for review, and the Board filed a cross–petition for enforcement of its Order. On August 24, 1995, in an unpublished decision, the court denied enforcement of the Board's Order and remanded the case to the Board, holding that the Respondent had raised a substantial factual issue as to whether alleged statements made by a union representative posed a threat that interfered with the employees' free choice in the representation election. Accordingly, the court remanded the case for the purpose of holding an evidentiary hearing with respect to the alleged threats. Thereafter, the Board ordered that a hearing be held before an judge for the limited purpose stated in the court's opinion, and that the administrative law judge prepare and serve upon the parties a decision containing findings of fact based on the evidence received, conclusions of law and recommendations.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the Union's oral argument and the posthearing brief filed by the Respondent I make the following

FINDINGS OF FACT

I. THE UNDERLYING REPRESENTATION CASE 32–RC–3595

Pursuant to a petition filed on August 11, 1992, and a Stipulated Election Agreement approved by the Regional Director on September 11, 1992, an election was held among the employees of Respondent in an agreed upon appropriate unit. The election, by secret ballot, was conducted under the supervision of the Regional Director on October 29, 1992. Of the approximately 10 eligible voters, 10 cast ballots of which 6 were cast for the Union and 4 were cast against the Union.[2] On November 4, 1992, Respondent filed timely objections to conduct affecting the results of the election. Thereafter, following an investigation of the objections, the Regional Director issued a Report and Recommendation on Objections, in which he recommended that Respondent's objections be overruled in their entirety. On December 10, 1992, Respondent filed Exceptions to the Regional Director's Report and Recommendation on Objections. On February 17, 1993, the Board issued a Decision and Certification of Representative, adopting the Regional Director's findings and

[1] 312 NLRB 475.

[2] There were no void or challenged ballots.

recommendations and certifying the Union as the exclusive collective–bargaining representative of the employees in the unit.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of its objections to the election in the underlying representation proceeding. The sole objection alleges:

> On or about October 27, 1991, just two days before the election, International Union of Operating Engineers, Local 39 held a group breakfast meeting attended by approximately seven to [sic] the ten eligible voters. At that meeting, Robert Herbruger and/or another individual, both officials of the Union, made statements to the employees that if they did not vote for the Union, they would lose their jobs. The Union received 6 of 10 votes cast.

The Union held a meeting for unit employees on October 27, 1992. Unit employees present were Ken Groat, Dennis Barba, Jesus Robles, Carlos Cabrales, Phil Menacho, LaVerne Breece, Juan Leija, and Karen Raynor. Two persons were present from the Union, Herbruger and another unidentified representative. Three of the eight employees present at the meeting testified at the hearing hereinKaren Raynor, LaVerne Breece, and Phil Menacho.

According to Raynor's initial testimony on direct examination, Herbruger said, "[I]f the Union did not get into UL, that UL knew who had signed cards for the Union, and that they could probably fire people that had voted for the Union." On cross–examination, she first testified that he said, "[D]espite what the company told us . . . that if we voted the Union in, that we would lose our jobs." She then testified that Herbruger said, "Respondent could find out who signed the cards, and if the Union did not get in, that the people that signed for the Union would lose their jobs." According to Raynor, she discussed this statement with Phil Menacho and probably other unit employees. She further testified that shortly after the meeting, she told Rich Horton, Respondent's human resources manager, that she thought the Union had threatened employees by saying that if the Union didn't get in, employees who were for the Union could get fired. Yet in the statement, she gave Horton on November 10, 1992, she states, "[A] union representative stated that despite what the company may have told us, if we vote no, we will lose our jobs."

Menacho testified that toward the end of the meeting there was a discussion about cards and who had signed them and who hadn't. At which time, one of the union representatives made a statement to the effect that the Company knew who had and hadn't signed cards up to that point and if the Union lost the election, Respondent would find a way to get rid of those people. He admits that this testimony is a paraphrase of what was said and in the statement he gave to Horton on November 10, 1992, his account is simply that "[a] union representative stated something to the effect that if the employees voted the union out, the company would find ways to get rid of us." Also, he finally admitted on cross–examination that Herbruger said, "[G]et rid of us."

Breece testified that, in response to a question as to what would be done if the Union didn't get in, Herbruger said, "There could be repercussions against the people that were trying to get the Union into Underwriters." He admits, however, that he cannot recall the actual words said by Herbruger. He further states that he does not recall any conversation or any words about authorization cards; nor does he recall a statement that if you voted against the Union, the employer could get rid of you."

I find Breece to be an honest, forthright witness, who readily admitted that he does not recall what was actually said by Herbruger in response to a question regarding what would happen if the Union didn't get in. In view of this admission, I find his account unreliable as to what was actually said regarding "repercussions." However, I do credit his testimony that he was present for the entire meeting and does not recall any conversation or words regarding authorizations cards. I also note that in her November 10 statement to Horton, Raynor makes no mention of authorization cards. Accordingly, I find that there was no discussion of authorization cards during the meeting.

Based on their demeanor, and the shifting nature of their testimony, I find neither Raynor or Menacho to be particularly reliable witnesses. Specifically, I find that, at the time of the hearing herein more than 3-1/2 years after the meeting, neither Raynor nor Menacho recalled precisely what was said at the meeting, and that they were attempting to testify in a manner most favorable to Respondent. Therefore, I do not credit their testimony at the hearing to the extent it differs from what they told Horton immediately following the meeting, as reflected in the November 10 statements. Further I do not credit them to the extent their testimony or earlier statements differ from Breece's testimony.

Accordingly, I find that Herbruger told employees that they would lose their jobs if they voted against union representation. I further find that the statement made by Herbruger made no reference to authorization cards nor was it made in the context of a discussion as to authorization cards.

B. *Contentions of the Parties*

In the Report on Objections, the Regional Director noted that "if the Employer is contending that by such statement Petitioner threatened to cause the discharge of employees if it lost the election, the Board has long held that employees can reasonably be expected to evaluate such remarks as being illogical and unenforceable, especially where, as here, there is no evidence that the Employer favored Petitioner or was disposed to discharge employees if Petitioner lost the election. *Janler Plastic Mold Corp.*, 186 NLRB 540 (1970). In the alternative, if the Employer is suggesting that the threat was a material misrepresentation of fact regarding what retaliatory actions the Employer would take if Petitioner lost the election, in *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), the Board announced that it would no longer probe into the truth or falsity of the parties' campaign statements, and would no longer set elections aside on the basis of misleading campaign statements."

The Charging Party/Union argues that if the employees in fact left the meeting thinking that the Respondent/Employer

could find out how each of them voted and that they would be fired, this would encourage the employees to vote for Respondent/Employer, not to vote for the Charging Party/Union.

Respondent/Employers argues that Herbruger's statement is a threat which is not illogical and that the statement interfered with the employees' "free choice." It further argues that the Ninth Circuit has dispositively held that *Janler Plastic Mold Corp.*, supra, is inapplicable to the facts of this case.

C. *Conclusions*

The credited facts herein are simple. Two days before the election at a meeting attended by at least 8 of the 10 unit employees, a union representative told employees they would lose their jobs if they voted against union representation. The issue herein is whether this is conduct sufficient to affect the result of the election. Contrary to Respondent's contention, I do not read the decision of the court to dispositively hold that *Janler* is inapplicable herein. Rather, the issue before the court was whether the Board abused its discretion in failing to hold an evidentiary hearing on the election objections. Therefore, all factual assertions were construed most favorably to Respondent. Thus, at the most, *Janler* was found to be inapplicable to the facts before the court at that time. My findings of facts, above, differ from the factual assertions in the summary judgment proceedings.

The essential question here is whether Herbruger's statement to employees that they would lose their jobs if they voted against union representation constituted a threat which could have coerced employees to vote for the Union. In *Janler*, the case relied upon by the Regional Director, a statement that the Company would fire employees if the Union lost the election was found to be illogical and unreasonable, and thus not coercive, since that result was what the Company wanted. However, in *NLRB v Valley Bakery*, 1 F.3d 769 (9th. Cir. 1993), the court considered coercive a statement that employees who signed authorization cards would be discharged by the Employer if the Union did not win the election. It would appear, therefore, that the difference between the two cases is that in *Janler*, the threat of job loss directed against all employees was illogical and that employees could be expected to conclude that the Employer would not fire employees who aided its cause; whereas, in *Valley Bakery*, the threat was directed toward those who aided the Union's cause.

I find *Janler* applicable to the conduct herein. The statement made by Herbruger was directed toward all employees. Moreover, there is no evidence that any employee felt intimidated or coerced by the statement. Accordingly, I conclude that Herbruger's statement did not warrant setting aside the election and I shall recommend that the objection relating to such conduct be overruled.

CONCLUSIONS OF LAW

1. The record does not support a finding of objectionable conduct affecting the results of the election in Case 32–RC–3595.

2. The Union was entitled to certification as exclusive representative of Respondent's employees in an appropriate unit.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act the National Labor Relations Board overrules the objections to conduct affecting the results of the election; affirms the certification of International Union of Operating Engineers, Stationary Local No. 39, AFL–CIO as the representative of the employees in the appropriate unit; and orders that Respondent, Underwriters Laboratories, Inc., Santa Clara, California, shall take the action set forth in the Order previously issued herein on September 28, 1993, at 312 NLRB 475.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.